ILE COPY

Supreme Court, U.S.
FILED
SEP 29 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 326

LEWIS LLOYD ANDERSON,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

MacDONALD GALLION
Attorney General of Alabama

DAVID W. CLARK
Assistant Attorney General of Alabama
Counsel For Respondent

INDEX

Subject Index

	Page
Opinions of the Court Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision Involved	2
Statement	2
Summary of Argument	4
Argument	5
Conclusion	14
Certificate	15

TABLE OF CASES CITED

Page

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1286 ..... 4, 7

Lewis Lloyd Anderson v. State, 120 So. 2d 397, Cert. den. 20 So. 2d 414 ..... 1, 4, 10

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 ..... 4, 6

Cassell v. Texas, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629 4

Fikes v. State, 263 Ala. 89, 81 So. 2d 303, 309, Reversed 352 U. S. 191 ..... 4, 9, 10

Kennedy v. State, 186 Tenn. 310, 210 S. W. 2d 132, Cert. den. 333 U. S. 846, 92 L. Ed. 1129, 68 S. Ct. 659 4

People v. Price, 371, Ill. 137, 20 N. E. 2d 61, Cert. den. 308 U. S. 661, 84, L. Ed. 463, 60 S. Ct. 94 5

Smith v. Mississippi, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900 ..... 5, 6

Tarrance v. Florida, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402 ..... 5, 10

Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 383 ..... 5, 6

STATUTES CITED

Code of Alabama 1940, Title 14, Section 320 2

Code of Alabama 1940, Title 30, Section 3, as amended 6

Code of Alabama 1940, Title 30, Section 46 7

Code of Alabama 1940, Title 30, Section 60 12

Code of Alabama 1940, Title 30, Section 64 12

United States Code:
Title 28, Section 1257 (3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 326

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals of Alabama is reported as follows:

Lewis Lloyd Anderson v. State of Alabama, 2nd Division 16, 120 So. 2d 397. The opinion of the Supreme Court of Alabama is set forth in 120 So. 2d 414.

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Appeals of Alabama rendered on November 10, 1959. Application to the Court of Appeals of Alabama for rehearing was denied on December 1, 1959. A petition to the Supreme Court of Alabama for writ of certiorari was denied on March

17, 1960, and application to the Supreme Court of Alabama for rehearing was denied on May 16, 1960. Petitioner applies under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTION PRESENTED

The petition in this case raises the following issue:

Whether the petitioner, who stands convicted in the State of Alabama of first degree manslaughter, as defined by Title 14, Section 320, Code of Alabama 1940, was indicted by a grand jury and convicted by a petit jury from which Negroes were systematically excluded by the Jury Commission of Dallas County, contrary to the provisions of the Fourteenth Amendment. The State of Alabama contends that Negroes were not systematically excluded from jury service on said juries.

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

The petitioner was tried and convicted in the Circuit Court of Dallas County, Alabama, of first degree manslaughter and sentenced to ten years' imprisonment. Before entering upon the trial in said Circuit

Court, the petitioner filed motion to quash the indictment. He also filed a motion to quash the venire, followed by a motion to declare void the composition of the jury sworn to try the defendant, all motions alleging systematic exclusion of Negroes from jury services. After hearing the testimony and considering the evidence offered by both petitioner and the State, the trial court overruled the motions. The excellent opinion of Judge Cates of the Court of Appeals of Alabama is full, comprehensive and complete and fully answers the contentions of petitioner in this Court.

At the conclusion of preliminary motions, petitioner entered a plea of not guilty. Trial was had before a jury which found petitioner guilty of manslaughter in the first degree and fixed his punishment at imprisonment in the Penitentiary of Alabama for ten years. The Court thereupon adjudged petitioner guilty of manslaughter in the first degree and sentenced him to ten years' imprisonment. Petitioner gave notice of appeal in open court and service of sentence was suspended pending appeal. Motion for new trial was overruled. The judgment and sentence of the lower court was affirmed by the Court of Appeals of Alabama, rehearing therein denied, petition to the Supreme Court of Alabama for writ of certiorari was denied and application to that court was subsequently denied, hence this petition for writ of certiorari.

The evidence was that on January 20, 1959, prosecution witnesses saw petitioner driving a car along Minter Street in Selma, Alabama, headed east at a speed of between sixty and seventy miles per hour; that Minter is an unpaved street in bad condition because of damp weather; that petitioner got to the cor-

ner of Church Street, ran into the front bumper of a green Chevrolet headed north on Church; that the momentum carried petitioner's car down Minter Street, where it swung to the right, then caromed to the left off some stone blocks on the north edge of the carriageway. As it began to swing again to the right, it hit and fatally injured Tom Reese, a Negro. After swerving to the right side of the street, it went back into the road again, on to the end of the block where it hit a tree, bounced four feet in the air and turned over. The defense was that the collision with the green Chevrolet was accidental, that petitioner was not speeding and that petitioner was knocked unconscious at the time of first impact. The conflict in evidence presented a jury question and the jury's verdict was that petitioner was guilty of manslaughter in the first degree.

VI

SUMMARY OF ARGUMENT

The lack of proportional representation of Negroes on the jury does not constitute discrimination under the facts presented. The evidence does not show that Negroes were arbitrarily or systematically excluded, in violation of the Fourteenth Amendment, from service either on the grand jury which indicted the petitioner or the petit jury which convicted him. **Akins v. Texas,** 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1286; **Lewis Lloyd Anderson v. State,** 120 So. 2d 397, Cert. den. 120 So. 2d 414; **Brown v. Allen,** 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397; **Cassell v. Texas,** 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629; **Fikes v. State,** 263 Ala. 89, 81 So. 2d 303, 309, Reversed 352 U. S. 191; **Kennedy v. State,** 186 Tenn. 310, 210 S. W.

2d 132, Cert. den. 333 U. S. 846, 92 L. Ed. 1129, 68 S. Ct. 659; **People v. Price,** 371 Ill. 137, 20 N. E. 2d 61, Cert. den. 308 U. S. 551, 84 L. Ed. 463, 60 S. Ct. 94; **Smith v. Mississippi,** 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900; **Tarrance v. Florida,** 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402; **Thomas v. Texas,** 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 383.

VII

ARGUMENT

In his petition for writ of certiorari to review the judgment of the Court of Appeals of Alabama, the petitioner contends that Negroes were systematically excluded from jury service in Dallas County, Alabama, and that, because of such exclusion, he was denied the due process and equal protection guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in his trial and conviction of manslaughter in the first degree. Before he was placed on trial, petitioner filed in succession motions to quash the indictment, to quash the venire, and to declare void the composition of the jury sworn to try him. Alleged systematic exclusion of Negroes from the jury rolls was the basis of these motions. The testimony of a number of witnesses was heard by the trial court on said motions and they were overruled. The respondent submits that this ruling was not error and involves no denial of due process or equal protection of law guaranteed by the Fourteenth Amendment, for the reason that the evidence fails to show that the jury commission systematically omitted qualified and not exempt negroes from the jury roll because they were Negroes or discriminated against them on that account.

Mere allegations of discrimination are not sufficient in and of themselves to sustain such a contention and the burden of proof to show an alleged discrimination is on the one making the allegation. **Smith v. Mississippi**, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900. The respondent submits that the burden was not met by the petitioner.

The evidence further showed that the Jury Commissioners of Dallas County, Alabama, had adopted a policy not to include those persons, white and Negro, qualified for jury service on the jury roll who were exempt from such service by reason of Title 30, Section 3, Code of Alabama 1940, as amended. The evidence showed that those responsible for obtaining jurors had fairly and honestly attempted to carry out their duties. Where that is shown this Honorable Court has held in **Thomas v. Texas**, 212 U. S. 278, 53 L. Ed. 512, that there was no evidence of discrimination.

Petitioner contends that the lack of proportional representation of Negroes on the jury roll infers discrimination. Both the courts of Alabama and the Supreme Court of the United States have held that the lack of proportional representation alone does not constitute discrimination. In **Brown v. Allen**, 344 U. S. 443, 97 L. Ed. 469, where defendant contended that discrimination was proved by evidence that thirty percent of those eligible as jurors were Negroes, while only seven percent of the names in the jury box were Negroes, a majority of the Court held that no discrimination against Negroes in the selection of the jury had been shown.

Evidence was brought out that each venire con-

tained an average maximum of seven or eight Negroes, with the normal total of the venire being around seventy summoned less those not found by the sheriff, and that on the present venire there were a number of Negroes.

In motions such as filed before the trial court, the movant carries the burden of proof to offer enough substantial evidence to reasonably satisfy the trial judge of the existence of a scheme to exclude. Respondent submits that the trial court's action in overruling the motions was rightly affirmed by the Court of Appeals of Alabama. As was stated in **Akins v. Texas**, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1286:

> "While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect (citing cases) we accord in that examination great respect to the conclusion of the state judiciary. Pierre v. La. 306 U. S. 354, 358, 83 L. Ed. 757, 760, 59 S. Ct. 536."

Petitioner contends that the failure to include every eligible Negro male citizen over twenty-one shows a systematic exclusion of Negroes from the jury roll. There is no legal reason for quashing an indictment or venire simply because the jury commission did not put the name of every qualified person on the roll or in the jury box, in the absence of fraud in drawing or summoning the jurors. Title 30, Section 46, Code of Alabama 1940. Equally illogical is the statement

that at least fifty-three percent of the eligible Negroes are potentially qualified for jury service.

Petitioner, in support of his contention that Negroes were systematically excluded from jury rolls, refers to testimony of the Jury Commission Chairman that in those areas where he did not know any Negroes, he relied on the advice of "a good white man" in selecting names of Negro jurors. He tries to show this to be similar to the exclusion as shown in **Hill v. Texas.**

A reading of the testimony of Glenn H. Defke on cross-examination disclosed the following which dispels the inference of the phrase quoted by petitioner:

"Q. Do you know all the negroes in all the precincts in Dallas County?

"A. No. I do not believe anybody does. (R.p.61)

"Q. What do you do about the precincts where you don't know the negroes?

"A. Ask some good white man.

"Q. And they in turn suggest names?

"A. Yes.

"Q. Would you say that you rely mostly on what you get from such good white men in their precincts in determining your jurors?

"A. Well, I would say what I get all together about white men, but non-white, I talk to some good folks in the country and some here in town.

"The Court: You mean good citizens in town.

"A. Yes, about non-whites. I know good citizens I talk to and advise about some of the folks to be put in the box and some left out.

"Q. Have you talked to negroes in Selma about prospective jurors?

"A. I have." (R. p. 62)

And on re-direct examination:

"Q. (By Mr. McLeod) This roll you testified you keep and cards you keep, is there any way you can look at these cards, and unless you know that person personally, can you tell whether it is a negro or white man?

"A. You certainly cannot. There is no identification as to race put on the cards at all." (R. p. 63.)

Clarification of the footnote contained on page 9 of petitioner's brief appears in order. It reads as follows:

"2 The opinion in Fikes v. Alabama, 81 So. 2d 303, 309, confesses that 'There had been only a small number of Negroes on previous rolls. Probably they had been systematically left off such rolls on account of race.'"

A reading of the opinion discloses that the Supreme Court of Alabama was referring to the jury rolls prior to the revised jury roll, which revision was made in October, 1953. The Court further said:

"It may be Negroes were systematically omitted prior to the roll made in October, 1953,

but that was not true in making up that particular roll."

Fikes v. State was reversed by this Honorable Court on another ground, that of the confession being involuntary. 352 U. S. 191.

In the absence of evidence to the contrary, there is a presumption or inference that the officers in charge of the selection and summoning of the jury have performed their duty fairly and justly without discrimination against eligible class or race. **Tarrance v. Florida,** 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402.

In support of his petition for writ of certiorari, petitioner cites numerous cases in an attempt to show that this case is so similar that a writ of certiorari should be granted. Cases cited by petitioner include such instances as where a jury statute provided that "all white males who are twenty-one years . . . shall be liable to serve as jurors," where no Negro had ever been known to have been on the jury roll, where payment of poll tax was a consideration, where jury box had either different colored or marked cards to distinguish Negro voters, where the judge selected the jury from cards drawn out by him and basing his selection on personal knowledge or reputation in the community, where a token number of Negroes were placed on the jury roll, etc. None of these instances referred to by petitioner in his brief were shown by the evidence to have existed.

Each contention of the petitioner has been fully answered in the opinion of the Court of Appeals in **Lewis Lloyd Anderson v. State,** 120 So. 2d 397, Cert. den. 120 So. 2d 414 (also in appendix to petition for

writ of certiorari), and for sake of brevity is incorporated into this brief by reference. In particular, the following part of such opinion is quoted as follows:

> "An analysis of the statutory method of picking jurors shows that the Alabama statutory scheme compares most nearly to that shown in the North Carolina case of Speller v. Allen, supra.
>
> "We have here no question of statutory exclusion, directly or indirectly. We do not require jurors, even those who cannot read or write English, to be property owners. We do not require jurors to be registered voters.
>
> "However, our statutes and decisions are replete with qualitative standards to bar those convicted of various felonies, misdemeanors and municipal offenses. The jury statutes probably also confer far too many occupational exemptions.
>
> "The only opportunities, under the Alabama statute, for a system of exclusion to operate would be either in (a) fraudulent drawings from the jury box for the venire or from the hat (or box) in picking a grand jury panel, or (b) a deliberate wilful passing over all qualified Negroes in making up the original list.
>
> "It is noteworthy in this case that Anderson did not, as did Norris in Norris v. State of Alabama, supra, make any attempt to produce the jury rolls in open court so that they

might be examined for the presence or absence of Negroes.

"Indeed, the State's evidence undisputedly showed that there were Negroes on the jury rolls. There was uncontroverted testimony that each venire contained an average maximum of seven to eight Negroes.

"(15) In noncapital criminal cases, it is within the province of the trial judge to excuse jurors from service on petit juries (Draper v. State, 250 Ala. 679, 36 So. 2d 73), and the same rule obtains in the selection of grand juries.

"(16) That in the last five years Negroes have, in many instances, asked to be excused from jury service in Dallas County, is not a showing of any action on the part of the State of Alabama or any of its officials to exclude them from juries.

"(17) The record does not show how the State and the defendant chose to exercise the strikes as to the array for the petit jury. See Code 1940, T. 30, § 60, as to striking jurors in noncapital criminal cases; § 64, capital cases. If this were to have been made a point upon appeal, the record could and should have been required so to show. Vernon v. State, 245 Ala. 633, 636, 18 So. 2d 388.

"' Jones, Trial by Jury in Alabama, 8 Ala. L. Rev. 274."

Respondent contends that there was not shown

any proof of systematic exclusion of Negroes from the Grand or Petit Juries in Dallas County, Alabama, and that the evidence shows that the trial court properly ruled on the motion to quash the indictment, motion to quash the venire and motion to declare void the composition of the jury sworn to try the defendant.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that the petitioner was indicted, tried, convicted and sentenced properly, and that due process or equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States was not violated in the trial of the petitioner. Therefore, the writ of certiorari in this case should be denied.

Respectfully submitted,

MacDONALD GALLION
Attorney General of Alabama

DAVID W. CLARK
Assistant Attorney General
of Alabama
Counsel for Respondent

CERTIFICATE

I, MacDonald Gallion, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1960, I served a copy of the foregoing brief and argument on one of the attorneys for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record, as follows:

To: Honorable Fred D. Gray
34 North Perry Street
Montgomery, Alabama

.....
MacDONALD GALLION
Attorney General of the State
of Alabama
Administrative Building
Montgomery, Alabama